PERPETUAL EXEMPTION FROM TAXATION.

REPORT

OF THE COMMITTEE ON THE JUDICIARY OF THE SENATE OF RHODE ISLAND, ON THE RIGHT OF A LEGISLATURE TO GRANT A PERPETUAL EXEMPTION FROM TAXATION.[1]

By resolution of the City Council of Newport, passed on the 4th of March, 1862, their Senator was instructed to endeavor to procure the alteration or repeal of so much of the charter of Brown University, as exempts the property of the president and professors from taxation, the said council stating that in their opinion there was no justifiable reason for such an exemption, especially at a time like the present, when all kinds of property must be necessarily, and probably heavily, taxed for the support of government and preservation of the Union.

On the 5th of March, 1862, the resolution was referred to the committee on the Judiciary for consideration.

At February sessions, 1764, the college was incorporated. The title of the act is, "an act for the establishment of a college or university within this colony."

The section under which this controversy arises is as follows: "And, furthermore, for the greater encouragement of this seminary of learning, and that the same may be amply endowed and enfranchised with the same privileges, dignities, and immunities, enjoyed by the American Colleges and European Universities, we do grant, ordain, and declare, and it is hereby granted, ordained, and declared, that the college estate, the estates, persons, and families of the president and professors for the time being, lying and within the colony, with the persons of the tutors and students, during their residence at the college, shall be freed and exempted from all taxes, serving on juries, and menial services; and that the persons aforesaid shall be exempted from bearing arms,

[1] The following able and comprehensive report, prepared by Mr. Elisha R. Potter, the chairman of the committee, is well deserving the perusal of our readers. The subject is one of great and growing importance.—*Eds. Am. Law Reg.*

impresses, and military services, except in case of an invasion." Subsequently the name of Brown University was given to the institution, in order to commemorate the generous donations of Hon. Nicholas Brown. Two questions present themselves, the power of the legislature to repeal these exemptions, and the propriety of doing so. The former of these questions we will first consider.

We suppose there could be little doubt of the right to repeal it, unless the legislature is restrained by the provisions of the State and United States Constitutions from interfering with it, on the ground that the charter is a *contract* with the corporation.

Since the year 1663, there has always existed a declaration of rights in this State, which was modified and enlarged in 1822, but it contains nothing affecting the present question.

Our present constitution, which took effect in 1843, provides in its declaration of rights, that "All laws should be made for the good of the whole; and the burdens of the State ought to be fairly distributed among its citizens." In section 12 of the same declaration it also provides, that no "ex post facto law or laws impairing the obligation of contracts shall be passed." This seems to have been adopted from the Constitution of the United States, which provides, Art. 1, § 2, that no State shall pass any "ex post facto law or law impairing the obligation of contracts."

The provision about ex post facto laws relates only to criminal or penal legislation.

It seems very strange that the provision about contracts which has become of so much importance, should have been so little noticed at the time of the adoption of the United States Constitution.

The authors of the Federalist (No. 44) barely allude to it. Hamilton in No. 32 says: "With the sole exception of duties on imports and exports, the individual States possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants; and, any attempt on the part of the National Government to abridge them in the exercise of it, would

be a violent assumption of power unwarranted by any article or clause of its constitution."

And nowhere in that work, or in the debates at the time, was the meaning ever given to this clause which was afterwards fastened upon it. It was undoubtedly intended to remedy the evils which had grown out of the paper money system, the legal tender laws, and the various laws interfering with the remedies on private contracts, which had grown out of the distresses of the Revolution. And so Judge TUCKER, whose edition of Blackstone was published in 1803, considers, see vol. 1, Part 1, appendix, "On the Constitution of the United States," page 311. But that a charter was to be deemed a contract, and to be considered irrepealable, was never then imagined. As an evidence of this, we may refer to the fact, that the charters of our two first banks, the Providence Bank and the Bank of Rhode Island, are published among the public statutes of the State, in the Digest of 1798.

And the fact that a charter was not then considered a contract is certainly important. Contemporaneous construction is always allowed to have considerable weight in deciding these questions of construction. The Supreme Court of the United States, in *Briscoe* vs. *Bank of Kentucky*, 11 Peters 318, say—"A uniform course of action, involving the right of the exercise of an important power by the State government for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightly exercised."

And so great was the mischief caused by the construction put on this clause by the United States Supreme Court, that in nearly all the charters granted after those decisions were made, an express provision has been inserted, making them repealable like all other public acts.

Judge STORY had even gone so far, as to hold that a salary fixed by law was a contract, 4 Wheaton 694.

There is another consideration, which, if the present case should ever come before a judicial tribunal, seems entitled to some weight.

At the time the college charter was granted in 1764, the Legis-

lature of Rhode Island possessed all legislative power, subject only to the provision contained in the charter, that the laws should not be repugnant to the laws of England. With this exception they possessed the full legislative power over all the business and property of the colony.

Was the charter considered a contract at the time it was made? Was it not then taken by the college subject to the repealing power the legislature then possessed? and if it was not a contract then, is it fair to apply to it the provision of the United States Constitution since made?

We shall hereafter quote the opinion of Chief Justice REDFIELD of Vermont, and which will be probably admitted as sound law, that the American legislatures possess all the powers of the British Parliament (subject to the limitations of their constitutions), and that Parliament possessed full power to legislate upon charters and to repeal them at pleasure.

Chief Justice MARSHALL also, in the Dartmouth College case, 4 Wheaton 651, holds the same opinion. "By the Revolution, the duties as well as the powers of government devolved on the people of New Hampshire. It is admitted that among the latter was comprehended the transcendent powers of Parliament, as well as that of the Executive Department. It is too clear to require the support of argument, that all contracts and rights, respecting property, remained unchanged by the Revolution. The obligations then, which were created by the charter to Dartmouth College, were the same in the new, that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present Constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the Constitution of the State.

Blackstone (in Commentaries, vol. 1, p. 90), says:

"Acts of Parliament derogatory from the power of subsequent legislatures, bind not * * * because the legislature being in truth

the sovereign power, is always of absolute authority; it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament; and upon the same principle, Cicero in his letters to Atticus treats with a proper contempt these restraining clauses which endeavor to tie up the hands of succeeding legislatures. When you repeal the law itself (says he), you at the same time repeal the prohibiting clause which guards against repeal." (*Cic. ad Att., lib.* 3, *ep.* 23.) Misquoted in *Bank of Ohio* vs. *Knoop*, 16 Howard 398.

Of course then, before the Revolution and before there was any constitutional restriction, our legislature had this full power over charters, and the college took the charter knowing this power resided in the legislature, and took it subject to that condition. Even if the charter was a contract, this power to repeal was a part of the contract, it was the condition on which they took the grant of the franchise. If it was a contract, and this condition of repealability was a part of the contract, then the United States Constitution cannot fairly be applied to alter its terms. If it was not considered a contract then, can the provision in the constitution be applied to it at all? And that it was not considered a contract at the time seems not to admit of much doubt. And even when the constitution was made, few of its framers probably ever imagined that a charter could be considered a contract to come within the prohibition. Even Judge STORY seems to admit this, Commentaries, vol. 3, § 1389; and see Judge MARSHALL in *Dartmouth College Case*, 4 Wheaton 644. It is comparatively a new construction, and it may be doubted whether even Judge STORY himself ever supposed the meaning of this clause could be stretched so as to authorize one legislature to grant a perpetual exemption from taxes beyond the power of a succeeding legislature to repeal, for he says in his Commentaries published in 1833, vol. 3, § 1386: "That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government, is admitted, and it has never been so construed."

We cannot very well come to any conclusion upon this subject

without taking a historical view of the cases which have been decided upon this paragraph of the constitution, which forbids any State passing any law impairing the obligation of contracts.

These decisions comprise several classes of cases, and in reading them it may be well to keep in view the distinction between a grant of land, or a regular treaty made by a State, or a law which interferes with a private contract on the one hand, and those laws which profess to yield up a portion of the sovereign power, as the power of taxing, or of taking property for public use, on the other hand. In regard to the first class of cases there can be no doubt; if the State has made a grant of land or an authorized treaty, it ought not to try to recall it. Nor ought they to interfere in a private contract. But the second class of cases stands on an entirely different ground; and we may fairly argue that the people have delegated their sovereign legislative power to the legislature to be exercised, but not to be surrendered; and that the legislature exceeds its power when it undertakes to surrender that trust.

The famous Yazoo case of *Fletcher* vs. *Peck*, A. D. 1810, was the first important case in the history of these decisions. This was a case where the Legislature of Georgia had granted a tract of land, and then undertook to repeal the grant. But even here Chief Justice MARSHALL makes a distinction. "The principle asserted," says he, "is that one legislature is competent to repeal any act which a former legislature was competent to pass; and, that one legislature cannot abridge the powers of a succeeding legislature." "The correctness of this principle, so far as respects general legislation, can never be controverted. But if *an act be done* under a law, a succeeding legislature cannot undo it. When then a law is in its nature a contract, a repeal of the law cannot divert these rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community." 6 Cranch 135. And, in the same case, Judge JOHNSON, in delivering his opinion, while agreeing in the decision, adverts to the distinction we have mentioned, and seems to have had some foresight of the dangers of the doctrines advanced *Fletcher* vs. *Peck*, 6 Cranch 143.

Judge JOHNSON.—"I do not hesitate to declare that a State does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity.

"A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the *distinction* lies between power and interest, the *right of jurisdiction* and the *right of soil.* The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions naturally are in no wise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community. When the legislature have once conveyed their interests or property in any subject to the individual, they have lost all control over it," &c.

The next case which is usually quoted in this connection, is *New Jersey* vs. *Wilson*, 7 Cranch 104, decided A. D. 1812.

The Legislature of New Jersey in 1758, while subject to no constitutional limitations, had made a treaty with an Indian tribe by which they exempted a certain tract of land from taxation. The Court decided that this was a contract the legislature could not repeal. There was no appearance for the State, and the case was not argued at all. Judge CATRON (16 Howard 401) says, that the question of one legislature having the power to abridge the power of the succeeding legislature was not raised there, and Judge PARKER (10 New Hampshire 138) makes the same remark. The taxing power had indeed been surrendered, but it had been done by a treaty made at a time when the State had a right to make such a treaty, which seems to distinguish this case from others.

See the case of *Armstrong* vs. *Treasurer of Athens County*, 16

Peters 290, in which Judge CATRON comments on this case of *New Jersey* vs. *Wilson.*

The next cases in order were *Terret* vs. *Taylor*, 9 Cranch 43, and *Pawlet* vs. *Clarke*, 9 Cranch 292, decided A. D. 1815. These were cases of grants of land, and the Court decided the legislature had no power to revoke them.

The next case involving the power of State Legislatures as to taxation (but not involving the question of contract), was *McCulloch* vs. *Maryland*, 4 Wheaton 428, decided A. D. 1819.

The State of Maryland had taxed the United States Branch Bank. It was a conflict of jurisdiction, and the Court decided that the bank was one of the constitutional means of the general government for carrying into effect the powers vested in it, and as such the State had no right to tax it. The sovereign power of the State did not extend to it. We refer to this case principally to quote the language of Chief Justice MARSHALL, showing that he considered the power of taxation as *essential* to the existence of government, and as one of the *incidents of sovereignty.*

Judge MARSHALL.—"It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. * * * The people of a State, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representative to guard them against its abuse. * * * It is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation," &c.

But the great and leading case on this question, is that of *Dartmouth College*, also decided A. D. 1819, 4 Wheaton 518. Dartmouth College was incorporated A. D. 1769, and, in 1816, the Legislature of New Hampshire passed an act altering the charter, to which act the college corporation did not give their assent

The Court here decided that the charter constituted a contract which the legislature could not alter without the consent of the corporation.

On reading the report of this case, one cannot avoid observing the industry and ability with which it was argued by the counsel for the college, and the half-heartedness or want of interest manifested by the counsel for the State. We can only account for it by supposing that the act of the legislature was really so objectionable in its provisions that the counsel did not feel very anxious to defend it; and that the Court, from the intrinsic equity of the case itself, felt a great desire to declare the act void, but in doing so laid down principles of which they themselves could not foresee the possible future applications.

But a few years before this, A. D. 1815, the case of *Portland Bank* vs. *Apthorp* had been decided in Massachusetts (12 Mass. 252), involving the question of the right to tax the banks for their privileges, and no one thought of referring to this clause of the constitution as having any connection with it.

Several cases have come before the United States Supreme Court, involving questions of taxing property which had been by charter exempted from taxation.

In 1845 the case of *Gordon* vs. *Tax Court, &c.*, was decided. 3 Howard 144. The corporation had constructed a road, &c., and in consideration of that had been exempted from any further tax. The Court say that the charter was a franchise; that if the corporation had paid a bonus for it, the legislature could not by a tax add to the price of it; they construed the exemption to extend not only to the franchise, but to the *stockholders*. This, in fact, was the question contested. There was no attempt to tax the franchise. Judge CATRON, of the same Court, afterwards (16 Howard 402) says, the only question at issue in it was the construction of the statute, and yet the case is generally quoted as deciding the whole question.

Afterwards, in the case of the *State Bank of Ohio* vs. *Knoop*, 16 Howard 369, when the charter in question had prescribed a particular rate of tax, the Court held it a contract which the Legis-

lature of Ohio could not alter. But it is to be observed that three of the judges dissented from the decision, and Judge TANEY agreed to it, but not for the reasons given by the majority. At the same time the Court decided the case of *Life Insurance Company* vs. *Debolt*, 16 Howard 416, involving the right of the Legislature of Ohio to interfere with a rule of taxation prescribed by a charter. The Court did indeed decide the case against the State, but the judges disagreed very much in their reasons for the decision. It might be said that they all dissented.

In the case of the *Providence Bank* vs. *Pitman*, the same Court, while intimating that an exemption of charter from taxation might be held good, decided there was no exemption in that case, and hold the following language as to the importance of this power of taxation. *Providence Bank*, 4 Peters 561.

"That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear."

It has always been considered by many of the members of the bar, that the Supreme Court, in their decision, misapprehended the question in the case. Whose fault it was, it is now of no use to consider.

These are the principal cases decided in the United States Court, affecting the right of a legislature to repeal an exemption from taxation granted by charter; and the remarks we have made may serve to indicate the degree of authority to be attached to them. The judges have never been unanimous upon it, and some of them have delivered very able dissenting opinions.

The cases on this question decided in the State Courts, have

been very differently decided, thus seeming to leave the matter in a very unsettled state. And many eminent members of the legal profession have been of opinion that the Courts have gone too far in holding (so far as they have held) a charter exemption from taxation to be irrepealable.

Professor Greenleaf, of the Law School at Harvard University, gives us his opinion as follows (Greenleaf's Cruise, vol. 3, title 27, § 29, note):—"In regard to the position that the grant of the franchise of a ferry, bridge, turnpike, or railroad, is in its nature exclusive; so that the State cannot interfere with it by the creation of another similar franchise, tending materially to impair its value; it is with great deference submitted, that an important distinction should be observed between those powers of government which are essential attributes of sovereignty, indispensable to be always preserved in full vigor, such as the power to create revenue for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for public uses and the like; and those powers which are not thus essential, such as the power to alienate the lands and other property of the State, and to make contracts of service, or of purchase and sale, or the like. Powers of the former class are essential to the constitution of society, as without them no political community can well exist, and necessity requires that they should continue unimpaired. They are intrusted to the legislature to be exercised, not to be bartered away: and, it is indispensable, that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature disabling itself from the future exercise of powers intrusted to it for the public good must be void, being in effect a covenant to desert its paramount duty to the whole people. It is, therefore, deemed not competent for a legislature to covenant that it will not, under any circumstances, open another avenue for the public travel within certain limits or a certain term of time; such covenant being an alienation of sovereign powers and a violation of public duty." But if a legislature has availed itself of private capital to make a road, they ought not to interfere with the privilege without full indemnity.

Judge REDFIELD (late Chief Justice of Vermont) expresses himself on the subject thus:—"In a late case in the Supreme Court of Vermont (27 Vt. Rep. 140), a doubt is expressed in regard to the entire soundness of the principle of legislative exemptions of corporations from taxation. It may be sound, perhaps, within certain limits, and so far as it can be clearly shown to have formed an essential ingredient in the consideration which induces the corporators to accept their charter and undertake the offices thereby created. If it were apparent that, without the exemption, the company would not have accepted their charter, it might with great propriety be urged that the indispensable condition of its existence should be held inviolable, even by the legislature."

And he goes on to observe, that the opinion of Judge CATRON in *Bank of Ohio* vs. *Knoop*, the decision of the State Court of Ohio in that case, and of the New Hampshire Superior Court in *Brewster* vs. *Hough*, that a legislature has no power to grant a perpetual exemption from taxation, seems the "sounder view of the law. And, as we have elsewhere said, we would not be surprised to find hereafter this whole subject of the right of a State legislature to exempt corporations by their charter from taxation brought in question, or, at all events, limited to exemption from special taxation. But the law at present is probably otherwise."

"It seems, too, that upon principle an exemption of this character is not an *essential* franchise of the corporation, and is therefore necessarily temporary in its character," &c. Redfield on Railways 526, note.

In *Thorpe* vs. *Rutland*, 27 Vermont 140, Chief Justice REDFIELD says, in delivering the opinion of the Court:—

"It has never been questioned, so far as I know, that the American Legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the organization of the American States. The people must of course possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legisla-

tures, saving only such restrictions as are imposed by the Constitution of the United States or of the particular State in question.

"It is conceded on all hands that the Parliament of Great Britain is competent to make any law binding upon corporations, however much it may increase their burdens or restrict their powers, whether general or organic, even to the repeal of their charters. * * * And if, as we have shown, the several State legislatures have the same extent of legislative power (with the limitations named), the inviolability of these artificial bodies rests on the same basis in the American States with that of natural persons."

"It has been questioned how far one legislature could in this manner abridge the general power of every sovereignty to impose taxes to defray the expense of public functions. It seems to me there is some ground to question the right of the legislature to extinguish by one act this essential right of sovereignty. I would not be surprised to find it brought into general doubt. But at present it seems to be pretty generally acquiesced in. But all the decisions in the United States Supreme Court, allowing the legislature to grant irrevocably any essential prerogative of sovereignty, require it to be upon consideration, and in case of corporations, contemporaneous with the creation of the franchise. Similar decisions in regard to the right of the legislature to grant perpetual exemption from taxation to corporations and property, the title to which is derived from the State, have been made by this Court (13 Vermont 525; and in some of the other States, 11 Conn. 251, and cases cited; 24 Miss. 386). But these cases do not affect to justify even this express exemption from taxation, being held inviolable, except upon the ground that it formed a part of the value of the grant, for which the State received a stipulated fee or consideration."

This case involved the question of the right of the legislature to pass a law making railroads liable for injuries done to cattle. The Court sustained the law.

A question may arise what are the *essential* incidents of a corporation, which belong to it as such, and form a part of the contract of incorporation. And here Judge REDFIELD quotes Chief

Justice MARSHALL, in the *Dartmouth College Case*, 4 Wheaton, and then goes on to say:—"Certain things it is agreed are essential to the beneficial existence and successful operation of a corporation, such as individuality and perpetuity (when the grant is unlimited); the power to sue and be sued, to have a common seal and to contract, and, in the case of a railway, to have a common stock; to construct and maintain its road, and to operate the same for the common benefit of the corporators. Certain other things, as incidental to the beneficial use of these franchises, are necessarily implied. But there is a wide field of debatable ground outside of all these. It is conceded that the powers expressly, or by necessary implication, conferred by the charter, and which are essential to the successful operation of the corporation, are inviolable." And then he further quotes Judge MARSHALL in the *Providence Bank Case*, 4 Peters 514. "The great object of an incorporation is to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist."

The case of the right of *eminent domain*, as it is called, or the right to take private property for public use, seems to be of a kindred nature with the right of taxation—(or rather the right of taxation may be considered as a branch of the right of eminent domain. In both cases private property is taken for public use.) After a long struggle the Courts have decided that, although the charter is a contract, yet the property of the corporation and the franchise itself may be taken by the legislature for public use, on paying compensation, and that this right of eminent domain, a right to take private property for public use, is one of the sovereign powers which one legislature cannot grant away or contract not to exercise.

"A State," says Chief Justice TANEY, "ought never to be presumed to surrender this power (the right of eminent domain), because, *like the taxing power*, the whole community have an interest in preserving it undiminished." *Charles River Bridge Case*, 11 Peters 544.

In the *West River Bridge Case*, A. D. 1848, 6 Howard 507, a bridge built under a charter had been taken for a highway. The bridge company relied on their charter being a contract, but the United States Court held that under the right of eminent domain the bridge could be so taken. Judge DANIELS delivered the opinion of the Court:—"No State, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres, necessarily, the right and duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be executed, not only in the highest acts of sovereignty and in the external relations of government; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantages of the whole society. This power, denominated the eminent domain of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.

"In our country it is believed that the power was never, or at at any rate rarely, questioned, until the opinion seems to have obtained that the right of property in a *chartered corporation* was *more sacred* and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest on, &c.

"These decisions (referring to them) sustain clearly the following positions comprised in this summary, given by Chancellor Walworth (3 Paige 73), when he says that, 'notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to *resume* the possession of the property in the manner directed by the constitution and laws of the State whenever the public interest requires it. This right of resumption may be exercised, not only where the safety, but where *the interest*, or

even the expediency of the State is concerned! In these positions, containing no exception with regard to property in a franchise (an exception which we should deem to be without warrant in reason), we recognise the true doctrines of the law as applicable to the cases before us.'"

Many other decisions have been made upon this subject of eminent domain, and in favor of the right of the State. In *Babcock* vs. *Lebanon*, 11 New Hampshire 19, the Court sustained the taking of a turnpike for a highway. The *Charles River Bridge Case*, 11 Peters Reports 420, is one of the most important. Case of the *Northern Railroad*, 7 Foster 183, that one railroad may take the track of another for compensation. In the case of the *Piscataqua Bridge*, 7 New Hampshire 35, the same principle was involved. The case in 2 Denio 474, relates to blowing up a building to prevent the spread of a fire. See also the case of the *Enfield Toll Bridge*, 17 Connecticut 40.

In *Gozzle* vs. *Corporation of Georgetown*, 6 Wheaton 593, the streets of Georgetown had been graded, and persons had built on the faith of it; and the right of the corporation to alter the grades was disputed, and it was claimed as a contract and unalterable. The Court, however (Judge MARSHALL giving the opinion), decided otherwise:—"A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract, which should so operate as to bind its legislative capacities for ever thereafter, and disable it from enacting a by-law, which the legislature enables it to enact, may well be questioned. We rather think the corporation cannot abridge its own legislative power."

Does not the reasoning here apply to a State as well as to a city corporation?

In 1 Foster (New Hampshire Reports) 393, it is decided that a town cannot grant an exemption from taxation.

In *Episcopal Church* vs. *City of New York*, 7 Cowen 584, the city had conveyed land for burial purposes, and covenanted for its quiet enjoyment. The city afterwards made a by-law prohibiting interments there, and it was held good. See also 5 Cowen 538.

In the State courts a number of cases have been decided of charter exemption from taxation, but not with sufficient uniformity to have much weight attached to them. In some of them the question seems to have been merely a question of construction, and not involving a right to repeal an exemption once granted.

In *Handy* vs. *Waltham*, 7 Pick. 108, Massachusetts had by statute exempted certain estate of Harvard College from taxes, and the Constitution of the State had confirmed the privileges of the college. The court said the exemption could not be repealed. But this seems to have been a question of construction, and the present question does not appear to have been raised.

In 1839 the case of *Brewster* vs. *Hough* was decided in New Hampshire. The Legislature had, in 1780, exempted by statute certain lands of Dartmouth College. The case was finally decided on the ground that the exemption was merely temporary. Chief Justice PARKER delivered the opinion of the court: "It may well be doubted, whether the legislature of 1780 could, by any proceeding which they might adopt, make a contract with the citizens of the State for the permanent exemption of any portion of the property lying within the government. * * * That form of government could not from its nature, and the present constitution does not contain any express grant or authority from the people empowering the legislature to make such a contract."

"The power of taxation is essentially a power of sovereignty, or eminent domain; and it may well deserve consideration, whether this power is not inherent in the people, under a republican government; and so far inalienable that no legislature can make a contract by which it can be surrendered, without express authority for that purpose in the constitution, or in some other way leading directly from the people themselves."

"To hold that the legislature cannot make a grant whereby the property shall be exempted from public use, and to hold also that they cannot contract to exonerate the property of the citizens from taxation, and thereby bind future legislatures, by no means indicates an opinion that the legislature have a right to rescind or abrogate grants of land and franchises, or contracts lawfully

entered into by a preceding legislature. The doctrine is well settled, that legislatures may make grants of some kinds, which come properly within the denomination of contracts, and such contracts, when made, are as inviolable as the contracts of an individual."

"It is as essential that the public faith should be preserved inviolate as it is that individual grants and contracts should be maintained and enforced. But there is a material difference between the right of a legislature to grant lands, or corporate powers, or money, and a right to grant away the essential attributes of sovereignty, or rights of eminent domain. These do not seem to furnish the subject-matter of a contract." *Brewster* vs. *Hough*, 10 New Hampshire 139.

For criticisms on this opinion see American Law Magazine for 1846, Art. 4.

Among the other cases decided in the State Courts on questions of exemption from taxation by statute or charter, are the following: In *Osborne* vs. *Humphrey*, 7 Conn. 335, a law of 1802 had exempted parsonages, &c. from taxation, and the land had been leased for 999 years. The act was repealed 1821, and the repeal was held void. *Atwater* vs. *Woodbridge*, 6 Conn. 223, is a similar case. In 11 Conn. 251, is a case of ministry land exempted by statute from taxation, and the exemption was held good. Judge CHURCH, however, dissented, and delivered a very able opinion, reviewing all the cases, and especially commenting on the two cases in 6 Conn. 223, and 10 Conn. 490, in which cases he says this question of the power of the legislature was not raised. 1 Metcalf 538, was a question of exempting meeting houses, but seems to relate to the construction of the act. 4 Metcalf 564, seems also a question of construction. *State* vs. *Branin*, 3 Zabriskie 484, also relates to the construction of a statute. So in *State* vs. *Tunis*, 3 Zabriskie. In the case of *Morris Railroad*, 3 Zabriskie 529, the charter was repealable. In the case of the *Easton Bank*, 10 Barr (Pa.) Reports 442, a rate of tax had been prescribed in the charter, but no stipulation that there should be no further tax, and the court upheld the additional tax.

In 13 Vermont 225, ministry land had been exempted by statute, and afterwards leased, and the exemption was held good. In the cases in Ohio—*Debolt* vs. *Ohio Life Insurance Company*, 1 Ohio 564; *Mechanics' Bank* vs. *Debolt*, 1 Ohio 581; *Toledo Bank* vs. *Boyd*, 1 Ohio 622; and *Piqua Branch of State Bank* vs. *Knoop*, in same volume, the court deny the right of the legislature to grant perpetual exemptions, and sustain their opinion by long and able arguments. In *Ohio* vs. *Commercial Bank of Cincinnati*, 7 Ohio 125, the rate of tax was fixed in the charter, and the court seem to hold it a contract the legislature could not alter, but Judge CATRON (10 Howard 400), says this was merely a case of construction of a statute, and that the constitutional question was not raised. See also what Judge CAMPBELL says, 10 Howard 413.

It is to be observed, also, that in very few of these cases was the State a party, or concerned in the contest; and in some of them the doctrine of contract is tacitly assumed without argument. As see 17 Conn. 93.

In a recent case, *Pennsylvania Canal Commissioners* vs. *Pennsylvania Railroad Co.*, decided June, 1857, Chief Justice LEWIS gives a thorough examination of the cases on this question and concludes that, in the absence of any constitutional authority, a State legislature has no power to sell, surrender, alienate, or abridge any of the rights of sovereignty, such as the right of taxation, so as to bind future legislatures, and any contract to that effect is void. Although the court refer as authorities to some of the Ohio cases, which had been reversed in the United States Supreme Court, yet the decision of the Pennsylvania court itself, and the reason they give for it, are entitled to no little weight, and show that the current of legal opinion is beginning to change upon this subject. See 5 Law Register 623. *Redfield on Railways*, § 229, page 531.

There was probably a reason why the courts formerly leaned strongly in favor of protecting corporations against the power of the legislatures. There were comparatively few corporations, and there was a strong popular prejudice against them, and they

needed the aid of the courts to preserve their existence. At the present time there is hardly an individual but is interested in some corporation, and it is rather the legislature which needs protection against the influence of combined corporations.

If a legislature can irrevocably exempt a corporation from taxation, they can do the same with a town. For services to the State they might exempt an individual, and his descendants, forever. For a sum paid down by way of commutation, they might exempt an individual, or a city, forever—or, they may exempt a part of the land in a town forever.

Have the people ever given them such a power?

In many cases the courts have sustained acts of legislatures, which divested rights of individuals. "It is clear, says Chief Justice TANEY, "that this court has no right to pronounce an act of the State Legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. * * * Nor are we aware of any decision of this, or any Circuit Court, which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract." *Charles River Bridge Case*, 11 Peters 540.

We have remarked that Judge STORY went so far as to consider a salary fixed by law, a contract the legislature could not alter, the courts have since decided to the contrary. See 8 Howard 163; 10 Howard 395; 6 Howard 548. So it has been decided, the legislature may release a penalty although the informer may have an interest in it: 10 Wheaton 248; 6 Peters 404. It is difficult to see the distinction between these cases and those where an exemption from taxation is claimed by virtue of a repealed *statute*. The case of a charter, however, it would be contended by some, did not stand upon the same ground.

The charter of the college was granted at a time when the people of the State had, comparatively, little wealth, and when salaries were small, professors poor, and, even with the exemption from tax, the professor's salary did not more than comfortably

support him. Circumstances have changed, and professors are now among our most wealthy men.

For several years the college had no professor, and for twenty years they had but one professor. The president's salary was a mere trifle.

Even if the charter is to be considered a contract, it would be full compliance with the spirit of the contract to exempt $0,000 worth of property from taxation; that being the amount usually held by professors in old times.

According to the letter of the charter an officer may hold any amount of property in trust for others. And the danger of *secret* trusts may be great hereafter. If the present officers are above suspicion, there is no harm in it, and it implies no disrespect to them, to guard against the future.

Some of the committee were of opinion that it would be better, as a mark of respect, and as the legislature do not wish even to appear to do anything to the injury of the college, to make the act conditional, and to request the consent of the corporation to it. If they refused, it would still be in the power of the legislature to repeal the exemption unconditionally. But the majority of the committee think best to report the bill unconditionally, having full confidence in the patriotism of the officers of the college, and not doubting but that they are willing, especially in a crisis like the present, to bear their just share of the burdens of the State.

The committee do not mean to say that the legal question is free from all difficulty, but they believe the courts will hesitate long before they deny the power of the legislature to interfere in the present case.

They respectfully report the following bill:

AN ACT to amend the charter of Brown University by repealing so much thereof as exempts the estates, persons, and families of the president and professors thereof from taxation.

Whereas, in times of public danger all persons ought to bear their share of the public burdens in proportion to their ability, and this General Assembly have full confidence in the patriotism of the said president and professors, and in their

willingness to bear their proper share of the taxation necessary for the preservation of our Union and Constitution, therefore

It is enacted by the General Assembly as follows:

So much of the act entitled "An act for the establishment of a college or university within this colony," passed at February session, A. D. 1764, as exempts the estates, persons and families of the President and Professors of said institution, now known as Brown University, from taxation, is hereby repealed.

NOTE.—It will be seen that this bill does not affect at all the college property, but only that of the college officers. Even on the ground of contract it can be hardly supposed that the exemption of the officers was one of the essentials of the charter, without which the college would not have accepted it.

In the Supreme Court of Vermont—January Term for Chittenden County 1862.

JOHN W. TRACY *vs.* ALONZO ATHERTON *et al.*

A right of way cannot arise from *mere necessity*, independent of any grant or reservation, express, or implied as in the case of a former unity of ownership.

This was an action of trespass *qu. cl.* The defendants pleaded in justification a right of *way of necessity* from the close occupied by them, over the plaintiff's close, to the public highway; the plaintiff's close lying between theirs and said highway; averring that at none of the said several times when, &c., could the defendants have access to their said close from said highway, or egress from their said close, to said highway, or to any other highway or public place, except over and across the close of the plaintiff, without going a greater and more inconvenient and an unnecessary distance, and over and across the closes of other persons; and therefore, that the defendants had, at said several times, when, &c., a necessary way for themselves, &c., and alleging the trespasses complained of to be the passing and repassing of the defendants upon said necessary way, as they lawfully might, &c. There was no averment of any former unity of ownership or possession of said closes, nor of any right by prescription. The plea was answered by a general demurrer. The county court, *pro forma*, ad